proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.' Customer proprietary network information ('CPNI') is defined as, among other things, 'information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier' See 47 U.S.C. § 222(f)(1)(B). It is clear, then, that 'information contained in the bills' regarding customer usage, times, etc. must be disclosed . . . upon 'affirmative written request' by the customer."

Ex. A hereto, pp. 5-6. The Texas district court concluded that "AT&T does not have a significant chance of success on the merits brought pursuant to the Telecommunications Act of 1996." Ex. A hereto, p. 13.

Because the order of the Texas district court in Southwestern Bell has a direct relationship to the issues presented in this case (United States v. Borneo, Inc., 971 F.2d 244, 288 (9th Cir. 1992)), appellants request that the Court take judicial notice of that Order, a true copy of which is attached as Exhibit A hereto. Appellants also request that the Court take judicial notice of two documents related to that Order: (1) an order, filed October 4, 1996 by the Texas district court in MCI Telecommunications Corporation v. Southwestern Bell Telephone Company, No. A-96-CA-651 SS (W.D. Tex. Oct. 4, 1996), denying MCI's application for temporary injunction for the same reasons as

set forth in Southwestern Bell (attached as Exhibit B hereto); and (2) a Motion for Voluntary Dismissal of Interlocutory Appeal, filed by AT&T Communications of the Southwest, Inc. and MCI Telecommunications Corporation, voluntarily dismissing their appeals from the above-described Orders (attached as Exhibit C hereto).

Dated: November 4, 1996.

BOBBY C. LAWYER
WALID S. ABDUL-RAHIM

KEVIN M. FONG
PILLSBURY MADISON & SUTRO LLP

By 
Kevin M. Fong

Attorneys for Appellants
Pacific Bell, Pacific Telesis Group, Pacific Bell Extras and Pacific Bell Communications

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., Plaintiff	§	
VS.	§	NO. A 96-CA-397 SS
SOUTHWESTERN BELL TELEPHONE COMPANY, et al., Defendants	§	

ORDER

BE IT REMEMBERED on the 20th day of September 1996 the Court called the above-styled cause for hearing on AT&T's Motion for Preliminary Injunction [#32]. Plaintiff AT&T has brought suit against Southwestern Bell Telephone Company ("SWBT"), SWBT's affiliate, Southwestern Bell Communications Services, Inc. ("SBCS"), and the parent corporation, SBC Communications, Inc. ("SBC") alleging violation of the Telecommunications Act of 1996, breach of contract (against SWBT only), misappropriation of trade secrets, unjust enrichment, breach of fiduciary duty, and civil conspiracy. Plaintiff AT&T now requests that this Court "reach out and touch" SWBT with its injunctive power to prevent the transfer of what AT&T considers to be AT&T's proprietary information from SWBT to SBCS.

In 1990, Plaintiff AT&T contracted with Defendant SWBT for the latter to provide AT&T's billing and collection services so that telephone service customers can receive all of their charges—both long distance and local service—in a single bill. The agreement provides for the provision of AT&T's customer billing information (including names, addresses, minutes of usage,

times of usage, etc.) to SWBT in a unique database format[1] which is then reconfigured by SWBT's software for incorporation into SWBT's own billing database. SWBT is then able to print out a customer bill containing a list of local charges, long distance charges, and the total charge, which is calculated by the software.

Earlier this year, the United States Congress passed and the President signed the Telecommunications Act of 1996 which, among other things, authorized the seven existing Regional Bell Operating companies ("RBOC's"), including SWBT, to enter the long distance service market upon the fulfillment of certain conditions. The Act also enables long distance providers such as AT&T to provide local exchange services in direct competition with the RBOC's and other new competitors.[2]

AT&T is, to put it mildly, disgruntled at SWBT's stated position on the transfer of long distance customer billing information in SWBT's database to SWBT's new start up affiliate, SBCS, which is preparing to enter the long distance service market. Employees of SBC delegated to work for SBCS conceived a marketing program, called the "Bill Harvesting Project," which involves obtaining actual customer long distance usage information in certain geographic areas and executing market analysis for preparation for entry into the long distance market. The program works as follows. SBCS first contacts customers by telephone to inquire as to whether the customer would authorize SWBT's release of the customer's long distance usage information to SBCS. Those customers who respond affirmatively are then sent a postcard which reads:

---

[1]Plaintiff represented that when the information is sent in this format, called AT&T's "invoice derived billing" format, it is virtually print-ready.

[2]Plaintiff represented at the hearing, however, that state law prohibits AT&T from entering the local service market in Texas.

DEAR SOUTHWESTERN BELL CUSTOMER:

Your cooperation is vital in helping Southwestern Bell Communications Services better understand your telephone communication needs, in preparation for their entry into the long distance market. Please sign your name on the line below and mail the card to us today.

I authorize Southwestern Bell Telephone Company to release a copy of my past 6 months bills including the long distance portion to its long distance subsidiary, Southwestern Bell Communications Services.

NAME:_____ DATE: ____/____/96

No postage is necessary, so please mail promptly. Thank You!

A later version of the postcard reads as follows:

DEAR SOUTHWESTERN BELL CUSTOMER:

Thank you for agreeing to participate in our marketing research survey. Your cooperation will help Southwestern Bell Communications Services better understand your communication needs, in preparation for its entry into the long distance market. **Per your earlier agreement, please sign your name on the line below and mail this card today.**

I authorize Southwestern Bell Telephone Company to release a copy of my past 6 months bills, including the long distance portion, to SBC's long distance subsidiary, Southwestern Bell Communications Services.

NAME: _____ **DATE:** ____/____/96

No postage is necessary, so please mail promptly. Thank you!
If you have questions, please call 1-800-775-4722.

The addressee listed on the reverse side of this version of the postcard is "Southwestern Bell Telephone Co."[3] The mailed-in, signed postcards are to be given to SWBT, which then transfers the

[3]There is no evidence before the Court as to the addressee on the earlier version of the postcard.

long distance information for those particular customers in its electronic database form to SBCS.[4]

Upon learning of the postcard program in May of 1996, Mr. C.D. Geiger of AT&T sent a letter to Ms. Sandy Kinney of Southwestern Bell Telephone Company asserting that the program violated the contract agreement of the parties and sections 222(a) and (b) of the Telecommunications Act of 1996 and demanding that SWBT immediately cease and desist from releasing the information and from sending out any more postcards. On June 6, 1996, Ms. Kinney responded with a letter explaining that the solicitation, implemented by "Southwestern Bell Communications," does not violate either the agreement or the Telecommunications Act of 1996 and therefore that AT&T's request would not be honored. AT&T thereafter filed suit in this Court and requested a preliminary injunction to prevent the transfer of information from SWBT to SBCS. The parties arrived at a tentative agreement obviating the need for a preliminary injunction at that time, but early in September Carol Beeman, an employee of SBC delegated to work on this project for SBCS, forwarded 100 signed authorization postcards to SWBT and requested the database information for the signing customers. Thus AT&T has again sought injunctive relief from this Court to prevent SWBT from transferring the database customer information to SBCS.

Standard for Relief

Rule 65 of the Federal Rules of Civil Procedure authorizes the granting of injunctive relief. Extraordinary relief will issue only where: (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the relief is

---

[4]It was established at the hearing that SWBT does not, despite being the addressee on the postcard, have the mailed-in signed postcards in its possession—SBCS does. This disparity between what is stated on the postcard and what is reality certainly seems to support plaintiff's contention that defendants are confusing customers as to who is truly seeking the information at issue. This has no bearing, however, on the issues before the Court.

not granted; (3) the threatened injury outweighs the threatened harm to the defendant; (4) the granting of relief will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Shanks v. City of Dallas, Texas*, 752 F.2d 1092, 1096-97 (5th Cir. 1985).

I. Substantial Likelihood of Success on the Merits

A. Telecommunications Act of 1996

AT&T charges that SWBT, when it ultimately supplies to SBCS upon customer authorization the electronic information originally provided to SWBT by AT&T, will be in violation of § 222(a) of the Telecommunications Act of 1996. Section 222(a) reads: "Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C. § 222(a). The parties do not dispute that SWBT and SBCS are or, in the case of SBCS, will soon be, telecommunications carriers.[5] Therefore, SWBT and SBCS have a duty to protect the proprietary information of both customers and other carriers. Section 222(c)(2), however, provides that "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer." Customer proprietary network information ("CPNI") is defined as, among other things, "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a

---

[5]Defendants vigorously argue that SBC is not a telecommunications carrier and SBCS is not yet a telecommunications carrier under the Act and therefore neither has a duty under the Act to protect proprietary information. Defendants' argument, at least at this stage in the litigation, is misplaced. AT&T is specifically seeking to enjoin conduct by SWBT, which is undisputedly a carrier. Furthermore, what is important in determining whether preventive injunctive relief should issue is whether imminent harm is threatened, and defendants admit that SBCS will very soon, as early as January 1997, be providing long distance service in the capacity of a telecommunications carrier.

carrier." *See* 47 U.S.C. § 222(f)(1)(B). It is clear, then, that "information contained in the bills" regarding customer usage, times, etc. must be disclosed by SWBT to SBCS upon "affirmative written request" by the customer. What is not clear, however, and what lies at the heart of this dispute, is (1) whether the information in its electronic form in SWBT's database is CPNI, *i.e.*, whether it is "information contained in the bills," and (2) whether the postcard authorization is an "affirmative written request" by the customer.

AT&T contends that SWBT's database of information regarding customers' long distance usage, which was created with minor reconfiguration from AT&T's database, is not CPNI and is AT&T's proprietary information that must not be disclosed by SWBT to anyone else by the terms of § 222(a). For support, AT&T cites *AT&T Communications v. Pacific Bell*, No. C96-1691SBA (N.D. Cal. July 3, 1996) (order granting preliminary injunction).[6] Although it was primarily charged with construing a different subsection of 47 U.S.C. § 222(c), the court in *Pacific Bell* had to determine, as does this Court, whether a database containing customer long distance information was CPNI under § 222(f)(1). The Court held that because the databases themselves "do not appear on customers' bills, . . . the databases are not CPNI, even if some of the data within those databases is." *Id.* at 11 (emphasis in original).

The Court finds the construction of CPNI advanced by AT&T and accepted by the court in *Pacific Bell* to be cramped, at best. Section 222(f)(1)(B) states that "information contained in the bills pertaining to telephone exchange service or telephone toll service" is CPNI. Plaintiff's reading of this provision would require an intellectual distinction between information contained in the *bills* and information contained in the *databases*. To make such a distinction would elevate form over

---

[6]Appendix "A" to AT&T's Opposition to Defendants' Rule 12(b)(6) Motion.

substance, quite literally; the form (binary digits versus ink on paper), rather than the substance, would determine whether that information is CPNI. "Information contained in the bills pertaining to telephone exchange service or telephone toll service" in its ordinary meaning must be simply the facts, the data, the raw knowledge regarding customer usage, times, etc. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 620 (9th ed. 1991) (defining "information" as "knowledge obtained from investigation, study, or instruction" and providing "facts" and "data" as synonyms). To hold that "information contained in the bills" refers only to data in the form of the printed word and not to the exact same data in electronic form would give a very technical definition to the term "information" —an atypical definition that would seem to require a special definition in 47 U.S.C. § 153, the definitions section of the statute. Yet no such definition can be found. In short, to construe Congress's modifying phrase "contained in the bills" to narrow the definition of "information" from its common sense meaning of "facts, data, knowledge" to a more technical meaning of "facts, data, knowledge in the form of the printed word" is to attribute to Congress an intention that can nowhere be gleaned from the face of the statute.

The information regarding customer long distance usage is, therefore, whether in the form of binary digits or ink on paper, CPNI which must be disclosed to a third party upon affirmative written request by the customer. In an attempt to hurdle this second obstacle, AT&T urges another narrow statutory construction—this time of the phrase "affirmative written request by the customer." AT&T contends that the postcards generated by SBCS, sent to customers, and subsequently mailed in by customers are not "affirmative written requests"; rather they are mere authorizations or approvals. Again, this would require the Court to make fine distinctions that do not appear to have been intended by Congress. The thrust behind § 222(c)(2) is to give control of CPNI to the customer—to

allow the customer to pass his or her CPNI from the telecommunications carrier to others designated by the customer. To require that the customer independently write a letter requesting the transfer of the CPNI to a third party, rather than permitting the suggestion to transfer the CPNI to originate from the third party itself and allowing the customer to ratify that suggestion, would frustrate the very goal the provision apparently seeks to achieve—effectuation of the legitimate desires of customers.

AT&T's argument does gain a bit of momentum when § 222(c)(2), in which the phrase "affirmative written request by the customer" appears, is juxtaposed with § 222(c)(1). In the latter section, Congress limited a telecommunications carrier's use of CPNI received by virtue of the carrier's provision of a telecommunications service to certain purposes absent requirements of law or "the approval of the customer." *See* 47 U.S.C. § 222(c)(1). AT&T contends that the use of different wording for a similar concept in § 222(c)(2) must mean *something* and this Court must give that something effect. *See United States v. Barial*, 31 F.3d 216, 218 (4th Cir. 1994) ("Where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect." (*citing Russello v. United States*, 464 U.S. 16 (1983))).

While this rule of construction is generally reliable, in this particular case, to give the effect that AT&T desires would require subjecting the statute to exacting linguistic scrutiny not apparently intended or warranted. Plaintiff's argument that a "request" can only be initiated by the party making the request slices the term too finely. Indeed, even Black's Law Dictionary defines a request as simply "[a]n asking or petition" and does not delimit the source of the idea. *See* BLACK'S LAW DICTIONARY 1304 (6th ed. 1990)[7]; *see also id.* at 581 (defining "express request" as "[t]hat which

[7]Plaintiff emphasized Black's definition of "request" as meaning "to solicit" in support of plaintiff's argument that a request must originate from the person making the request. Plaintiff improperly cited to the definition for the *verb* "request" rather than the *noun* "request," however.

occurs when one person commands or asks another to do or give something, or answers affirmatively *when asked* whether another shall do a certain thing" (emphasis added)).

At the end of the day, legal dictionary definitions serve as poor lenses with which to view the collective congressional mind and resort must usually be made to other interpretive tools, both structural and historical. Ironically, the fact that usage does not always precisely correspond with legal definition is illustrated by the argument made in this very case by AT&T. In its Response to Defendants' Reply to AT&T's Response to Defendants' Motion for Summary Judgment, AT&T characterizes the script used by defendants' telemarketers as a device to "obtain approval" of the customer. That script reads: "Would you give Southwestern Bell Communications Services permission to receive a copy of [your bill]?" Yet any affirmative response given to this question, and any signature on the postcard, would be, according to the dictionary, not an "approval," but an "authorization." *See* BLACK'S LAW DICTIONARY 102 (6th ed. 1990) (distinguishing the term "approve," which means to ratify ex post facto, from the term "authorize," which means to permit a thing to be done in the future); *cf. United States v. McCord*, 695 F.2d 823, 827 (5th Cir.) (using the concepts "approve" and "authorize" interchangeably), *cert. denied*, 460 U.S. 1073 (1983).

The point is further illustrated by the language used in § 222(c)(1). That provision, as explained earlier, allows for expansion of the permissible uses of CPNI by a carrier "with the approval of the customer." *See* 47 U.S.C. § 222(c)(1). It is doubtful that Congress intended to permit telecommunications carriers to unilaterally lift the veil of privacy statutorily cloaking CPNI and then, after the fact, obtain the approval of the customer to which the CPNI relates. Yet this is precisely

---

See BLACK'S LAW DICTIONARY 1304 (6th ed. 1990). The definition for the noun does not contain any similar such "solicitation" language. Regardless, to say that something is "solicited" does not necessitate that the *idea* for making the solicitation did not originate elsewhere.

what AT&T's suggested linguistic scrutiny would require of § 222(c)(1)—the term "approval" itself, in its strictest etymological construction, is an after-the-fact ratification. *See* BLACK'S LAW DICTIONARY 102 (6th ed. 1990).

Thus we are faced with the option of giving effect to Congress's choice of slightly different terms for similar concepts in proximate subsections of the statute or giving effect to what appears to be Congress's intention with regard to a customer's ability to control his or her own long distance information. The Court finds the latter option more prudent and appropriate and therefore concludes that the postcards originated by SBCS, signed by the customer, and mailed back to the defendants are "affirmative written requests" by the customer under § 222(c)(2).

The question whether a customer should have the power to destroy the legal protection of a carrier's proprietary information where that information is also CPNI relating to that particular customer is an important policy question appropriate for careful legislative consideration and explanation. It is clear that at least some members of Congress considered the issue, but the evolution of the relevant provisions leaves no clear inferences to be drawn and congressional reports do little to break through the cloud cover. Legislative history, often a powerful tool of statutory interpretation, is thus unhelpful to resolution of the particular issues presented.

When Senate Bill 652, the bill that ultimately passed into law as the Telecommunications Act of 1996, was originally passed in the United States Senate, it contained a confidentiality provision stating that a telecommunications carrier that receives "proprietary information of, and relating to, other common carriers and customers . . .from another carrier for purposes of provisioning, billing, or facilitating the resale of its service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." S. 652, 104th Cong., 1st Sess., § 301(d)

(version of June 15, 1995). A House amendment to the Senate bill contained a similar provision related to customer information. The amendment prohibited the use of CPNI "in the identifications or solicitation of potential customers for any service other than the service from which such information is derived." *See* S. Rep. No. 104-230, 104th Cong., 2nd Sess. § 702 (1996). The House Report accompanying H.R. 1555, which contained the amendment, stated that the House committee intended "service" to be defined narrowly and "[t]hus, in no event should this section be construed to permit a carrier to use CPNI to market long distance services to their local customers or local telephone exchange services to their long distance customers." H.R. Rep. No. 104-204, 104th Cong., 2d Sess. 90 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 57.

These early forms of the bill offer strong support for the proposition that proprietary customer information is not to be used for marketing purposes. But the version of the bill that passed out of the conference committee and was ultimately signed into law alters the language significantly. The Act contains two separate provisions governing carrier information and customer information. The only explicit reference to a prohibition on use of proprietary information for marketing purposes appears in § 222(b), a provision entitled "Confidentiality of carrier information" and separate from another section, § 222(c), the provision governing "Confidentiality of customer proprietary network information." The carrier provision, § 222(b), provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." Defendants contend the separation of the two kinds of proprietary information in the final bill indicates that the "proprietary information" in § 222(b) refers solely to proprietary technical information, that is, information other than customer usage

information, and that only § 222(c) governs proprietary customer information. Regardless of whether this interpretation is correct,[8] what is clear is that billing and collection services are not "telecommunications services" within § 222(b), the only section explicitly prohibiting use of proprietary information for marketing purposes. "Telecommunications service" is defined in the Act as meaning "the offering of telecommunications for a fee directly to the public . . . ." 47 U.S.C. § 153 (46). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 157(43).[9]

Unfortunately, whether Congress truly intended to effect what appears to be a sea-change from its earlier position and allow for proprietary information provided for billing and collection services to be used by the recipient carrier in marketing efforts is unclear from any of the legislative history. The Conference Report's description of the conference agreement does nothing to illuminate the reasons for the change. It simply restates the wording of the final provisions and notes that the conferees agreed upon a customer disclosure provision. The Court is thus guided only by the statute itself and the purpose of the Act, which in relevant part is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56, 56 (1996). Both the plain language of the statute and the policy of increasing

---

[8]And the Court must confess its inability to surmise any kind of technical, non customer-related information that would ever be used for "marketing purposes."

[9]AT&T withdrew its reliance on § 222(b) for support of its argument. It is unclear whether this decision is based on a concession that § 222(b) applies to non-customer technical information, or because the definition of "telecommunications service" quite clearly does not include billing and collection services, or for some other reason.

competition and securing lower prices for American telecommunications consumers suggest the conclusion that customers may require the release of their CPNI to others.

The Court therefore concludes that AT&T does not have a significant chance of success on the merits of its claim brought pursuant to the Telecommunications Act of 1996.

B. Breach of Contract

Plaintiff AT&T alleges that SWBT's transfer of the customer information in database form to SBCS will breach the 1990 billing and collections agreement between AT&T and SWBT. The agreement provides that "Proprietary Information . . . whether or not owned by a Party, shall be given the same protection and treatment afforded the Party's Proprietary Information which it does own. *See* Agreement, Exhibit K(2)(a).[10] The Agreement designates as "proprietary" all information regarding customer toll usage, "WATS" line usage, 800 service usage, coin usage, customer service and equipment records, customer credit information, non-published telephone numbers, and the agreement itself. *See* Agreement, Exhibit K(1). Even when one party is claiming ownership of, or other property interest in, proprietary information, the other party "may disclose or provide Proprietary Information . . . to respond to Customer requests." The disclosing party must first "notify the other Party so as to give that Party a reasonable opportunity to object to such disclosure." *See* Agreement, Exhibit K(2)(b).

These provisions alone indicate that SWBT has not breached the agreement. Plaintiff's contention that the postcard authorizations, because initiated by the defendants, are not "requests" elevates form over substance as discussed earlier. "Request" is not specially defined in the agreement

---

[10]Exhibit "1" to AT&T's Motion for Temporary Restraining Order and Appendix "B" to AT&T's Opposition to Defendants' Rule 12(b)(6) Motion.

and therefore the Court construes it to have its ordinary meaning, which in this instance is the same as the dictionary definition: "An asking or petition. The expression of a desire to some person for something to be granted or done." *See* BLACK'S LAW DICTIONARY 1304 (6th ed. 1990). A signed postcard authorization qualifies as a "customer request" and therefore SWBT, a party to the agreement, may release proprietary information provided to it by AT&T under the terms of the agreement.

Furthermore, the agreement provides that "[n]otwithstanding any other provision in this Agreement, a Party's ability to disclose information or use disclosed information is subject to all applicable statutes, decisions, and regulatory rules concerning the disclosure and use of such information which, by their express terms, mandate a different handling of such information." *See* Agreement, Exhibit K(7). The customer information defined as "proprietary" under the contract and at issue in this case is CPNI under the Telecommunications Act of 1996. *See* 47 U.S.C. § 222(f)(1)(B) (defining CPNI to include "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier"). Under the Act, CPNI *must* be disclosed by SWBT upon affirmative written request by the customer. *See id.* § 222(c)(2). The Act's disclosure provisions thus trump the agreement's disclosure provisions by the agreement's own terms.

In sum, AT&T cannot establish a substantial likelihood of prevailing on the merits of its breach of contract claim.

C. Misappropriation of Trade Secrets

Plaintiff also alleges that defendants' anticipated conduct would constitute a misappropriation of trade secrets. To establish a misappropriation of trade secret, plaintiff must establish: (1) a trade

secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff. *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994). A trade secret is "any formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it." *Id.* Plaintiff argues the proprietary information is akin to a vendor's list of customer names, addresses, and purchasing characteristics, which is protected as a trade secret under Texas law. *See Zoecon Indus. v. American Stockman Tag Co.*, 713 F.2d 1174, 1176 (5th Cir. 1983). A list of customer information is not protectable as a trade secret, however, if the information is generally known by others in the same business or readily ascertainable by an independent investigation. *Id.* at 1179. SWBT argues that it could obtain the identical long distance usage information by placing switches on its own lines to record the information and therefore that the customer list analogy is inapposite. Plaintiff, however, has submitted affidavits indicating that the collection of customer usage information is an expensive process. The expense renders the information not readily ascertainable and thus not subject to the exception for readily ascertainable customer lists. *See id.* at 1178-79 (failing to hold a district court's finding of a similar fact to be clearly erroneous).

Defendants seek to distinguish this particular list of customer information, arguing that once the information is published to the customer in the customer's bill, it ceases to retain any "secret" character it once may have had. Plaintiff is correct that this argument misconceives the nature of plaintiff's claim. It is not the raw information that is at issue, rather it is specifically the information in electronic form that AT&T seeks to protect—and alas, we have once again entered the conundrum of information as raw data versus information as data in a particular format. The proprietary

information protected in *Zoecon* was the information itself, the raw data, rather than the information in a particular format. The case is therefore not precisely on point. However, it is not distinguishable in any relevant way. Although the customer long distance information could conceivably be compiled by the defendants without acquiring the database, the fact that AT&T spends a considerable amount of money to compile the database may be sufficient to confer trade secret status upon it. *Cf. Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1125 (5th Cir. 1991) ("Secrecy is a relative term. The information may be known to several persons and yet still be secret if third parties would be willing to pay for a breach of trust in order to ascertain it." (citation omitted)), *aff'd on other grounds*, 505 U.S. 763 (1992).

Even if the database is classified as a trade secret, plaintiff's claim for misappropriation of its trade secret is likely to fail on the second required element. Given the disposition of the statutory and breach of contract claims, it cannot be said that the trade secret, the database, was "acquired through a breach of a confidential relationship or discovered by improper means." The contract expressly provides that contrary statutory provisions governing disclosure of customer information control, and the Telecommunications Act, as extensively discussed, likely provides for the disclosure of the database information at issue. Therefore, plaintiff is unable to establish a substantial likelihood of success on the merits of its misappropriation of trade secret claim.

d. Unjust Enrichment

Plaintiff's fourth claim is for unjust enrichment. Under Texas law, however, unjust enrichment is not an independent basis for a cause of action. *LaChance v. Hollenbeck*, 695 S.W.2d 618, 620 (Tex. App.—Austin 1985, writ ref'd n.r.e.); *accord Microsoft Corp. v. Manning*, 914 S.W.2d 602, 609 (Tex. App.—Texarkana 1995, writ dism'd). The term "unjust enrichment" simply characterizes

the result when one fails to make restitution of benefits received under circumstances implicating an implied or quasi-contract. *LaChance*, 695 S.W.2d at 620. The unjust enrichment doctrine forms the basis of the measure of contractual damages known as quasi-contract or restitution. *Burlington N. R.R. Co. v. Southwestern Elec. Power. Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996, no writ). Where the existence of a binding contract cannot be proven, the law implies a contractual obligation upon the defendant to restore the benefits unfairly received to the plaintiff. *See id.* Where a valid, express contract governs the subject matter of the dispute, however, the equitable remedy is unavailable. *Id.*

Here, the disclosure of proprietary customer information is expressly governed by the parties' agreement concerning billing and collections, and therefore plaintiff cannot obtain damages on the theory of unjust enrichment. Moreover, the receipt of the customer proprietary network information is permitted under the terms of both the statute and the contract and cannot therefore be considered "unjust." *See, e.g., id.* (explaining that unjust enrichment is usually found where there is fraud, duress, the taking of an undue advantage, or an where an intended contract is legally void). Plaintiff cannot establish a substantial likelihood of success on the merits of this claim.

e. Breach of Fiduciary Duty

By its fifth cause of action, AT&T contends that the defendants are agents of AT&T and are breaching a fiduciary duty owed to AT&T when they solicit AT&T's customers to request that SWBT release the customers' proprietary information and when they provide this information to AT&T's soon-to-be competitor, SBCS. To establish a breach of fiduciary duty, plaintiff must first, of course, establish that a fiduciary relationship exists between it and the defendants. Under Texas law, an agency relationship gives rise to a fiduciary relationship as a matter of law. *Sassen v.*

Tanglegrove Townhouse Condominium Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

AT&T claims that SWBT is its agent, apparently by virtue of the contract between them. "Essential to an agency relationship," however, "is the principal's right to assign the agent's task and control the means and details of the process by which the agent will accomplish the task." *Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 452 (Tex. App.—San Antonio 1992). Thus, "even if a person acts for or accommodates another," without the element of control the relationship of agency does not exist. *Id.* Although the service contract between AT&T and SWBT obligates SWBT to bill for and collect long distance charges belonging to AT&T, the contract does not appear to give AT&T the requisite element of control over the details of the billing and collection to render it SWBT's principal. SWBT is therefore not AT&T's agent.

Fiduciary duties may also arise from a less formal relationship than that of agency. A fiduciary relationship exists wherever one party is "under a duty to act for or give advice for the benefit of another within the scope of the relationship." *Doe v. Boys Clubs, Inc.*, 868 S.W.2d 942, 955 (Tex. App.—Amarillo 1994), *aff'd on other grounds*, 907 S.W.2d 472 (1995). It may arise from imbalance of power where justifiable trust exists. *See id.* It cannot, however, arise merely by the existence of a contract. "[A] party to a contract is free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability." *Crim Truck & Tractor Co. v. Navistar Int'l Trans. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). A fiduciary duty must inhere in the relationship outside the contract itself.

The relationship between AT&T and SWBT appears to be simply contractual rather than of the "extraordinary" quality of fiduciary. *See Doe*, 868 S.W.2d at 955 (describing fiduciary duties as

"extraordinary"). Defendants' action of soliciting customer requests simply cannot be accurately characterized as an abuse of influence. It cannot reasonably be believed that AT&T, an enormous, highly sophisticated corporation, vested its trust and reliance in SWBT (and, by extension, SWBT's alleged coconspirators) not to solicit customer requests for disclosure when the agreement itself contemplates customer-authorized disclosures. The contract is the product of an arms-length transaction between corporations of comparable power. The proprietary quality of the information provided pursuant to the contract does not alone create a fiduciary duty.

Plaintiff cannot establish a substantial likelihood of success on the merits and therefore this cause of action provides an insufficient cause upon which to ground a preliminary injunction.

f. Civil Conspiracy

Plaintiff's last hope is its claim for civil conspiracy. The essential elements that must be established to prove a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Plaintiff is unlikely to succeed on this claim because it is unlikely to be able to establish an unlawful act.

Because Plaintiff AT&T cannot establish a substantial likelihood of success on any of its causes of action, the inquiry ends here; the Court cannot grant the preliminary injunction AT&T seeks. However, in the interest of completeness, the Court will briefly touch upon the other elements required to obtain an injunction.

II. Irreparable Injury

There is quite plainly a substantial threat AT&T will suffer harm if relief is not granted, but the harm is not irreparable. AT&T is soon to be in a direct competitive relationship with SBCS, the entity to receive the proprietary information at issue. Truly, AT&T will lose a competitive edge it currently maintains over its new competitor if it is required to share information for which a significant amount of resources was expended to obtain. And SBCS's stated intention to compile the information by data entry from the physical bills in the event an injunction is granted does not change this result. AT&T's competitive edge, however, unlike a secret process, product, or the like, is simply dollars—the defendant competitor will have to spend more money to acquire the customer information for marketing purposes if an injunction is granted than if it is not granted. Monetary loss alone is not the sort of "irreparable injury" appropriate for equitable relief—monetary damages can be awarded in a lawsuit.

III. Threatened Injury Outweighs Threatened Harm to the Defendant

The injury threatened to the plaintiff appears to outweigh the harm to the defendant caused by an injunction. Defendants have submitted an affidavit indicating that SBCS will have to expend $4,875,000.00 if an injunction were to issue. Plaintiff rebuts this contention with an affidavit indicating the cost to defendants would only be $300,000. Defendants would clearly have to expend substantial sums to obtain the desired information without the databases. Without an injunction, however, plaintiff would suffer financial injury not only in this instance but in all prospective situations similar to this case. This injury likely outweighs whatever harm defendants would actually incur if enjoined.

IV. The Granting of Relief Will Not Disserve the Public Interest

Given the central purpose of the Telecommunications Act of 1996 to stimulate competition for the benefit of customers, granting the injunction would appear to disserve the public interest. Truly, one negative result of a failure to enjoin defendants will likely be (and it is suggested already has been) an unwillingness on the part of long distance service providers like AT&T to enter into billing contracts for the provision of a single telephone bill. The burden to the telecommunications consumer of paying two separate bills, however, is far outweighed by the benefits flowing from increased competition in an historically regulated, even strangulated, industry. The Court concludes, therefore, that enjoining the defendants' activities would, on balance, disserve the public interest.

Plaintiff is only able to establish one of the four requisite elements for the issuance of a preliminary injunction. Therefore,

IT IS ORDERED that Plaintiff's Motions for Temporary Restraining Order [#2] and for Preliminary Injunction [#32] are DENIED.

SIGNED on this the 4th day of October 1996.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 10-4-96

By _____ Deputy

MCI TELECOMMUNICATIONS CORPORATION	§	
VS.	§	NO. A 96 CA 651 SS
SOUTHWESTERN BELL TELEPHONE COMPANY, SOUTHWESTERN BELL COMMUNICATIONS SERVICES, INC., AND SBC COMMUNICATIONS, INC.	§	

ORDER

BE IT REMEMBERED on this the 4th day of October 1996 the Court, having reviewed all pleadings and after the argument of counsel, finds that the plaintiff's application for temporary injunction should be denied on the same basis, and for the same reasons, as set forth in the order of this Court entered on this date in *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, et al.*, No. A 96 CA 397 SS.

IT IS ORDERED that the plaintiff MCI Telecommunications Corporation's application for temporary injunction is OVERRULED and DENIED.

SIGNED on this the 4th day of October 1996.

Sam Sparks
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. Plaintiff, VS. SOUTHWESTERN BELL TELEPHONE COMPANY, et al. Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. A-96-397-SS (CONSOLIDATED)
MCI TELECOMMUNICATIONS CORPORATION. Plaintiff, VS. SOUTHWESTERN BELL TELEPHONE COMPANY, et al. Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. A-96-CA-651-SS (CONSOLIDATED WITH A-96-397-SS)

MOTION FOR VOLUNTARY DISMISSAL OF INTERLOCUTORY APPEAL AND REQUEST FOR STATUS CONFERENCE

COME NOW, AT&T Communications of the Southwest, Inc. ("AT&T"), and MCI Telecommunications Corporation ("MCI") and, pursuant to Federal Rule of Appellate Procedure Rule 42(a), file this their Motion for Voluntary Dismissal of Interlocutory Appeal, and in support thereof would show the Court the following: